Whistleblower Newsletter STAA Cases

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U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002
(202) 693-7500
www.oalj.dol.gov

John M. Vittone
Chief Judge

Thomas M. Burke
Associate Chief Judge
for
Black Lung and
Traditional

Highlights of this issue:

Procedure:

Burden of Proof and Production:

• Refusal to submit to random drug test. *Bergman v. Schneider National*, ARB No. 03-155, 2004-STA-19 (ARB Apr. 29, 2005). [Page 6]

• Merely asking about a policy of the respondent is not protected activity. *Toland v. Keystone Freight Corp.*, ARB No. 03-151, ALJ No. 2003-STA-25 (ARB Jan. 28, 2005). [Page 6]

Employer/Employee:

• Identification of proper respondent. *Sexton v. Kroll's Trucking*, ARB No. 04-030, ALJ No. 2003-STA-18 (ARB Apr. 29, 2005). [Page 7]

Damages and remedies:

• Complainant's waiver of reinstatement is not determinative - in most cases reinstatement is mandatory. *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, 2002-STA-30 (ARB Mar. 31, 2005). [Page 8]

• Front pay in lieu of reinstatement where owner-operator no longer owns truck. *Ass't Sec'y & Bryant v Mendenhall Acquistion Corp.*. ARB No. 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005). [Page 9]

• ALJ duty to inform pro se respondent of its burden of proof on mitigation issue. *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, 2002-STA-30 (ARB Mar. 31, 2005). [Page 12]

• Enhancement of attorney fee award for delay. *Dalton v. Copart, Inc.*, ARB Nos. 04-027 and 04-138, ALJ No. 1999-STA-46 (ARB June 30, 2005). [Page 12]

[STAA Digest II E 7]
REMAND TO OSHA; AUTHORITY OF ALJ; LETTER PRACTICE OF SOLICITOR'S OFFICE

In ***Fraley v. Transervice Logistics, Inc.***, 2005-STA-11 (ALJ June 27, 2005), the ALJ had granted a joint motion to remand to OSHA for further proceedings before that office, and the Regional Solicitor wrote a letter to the ALJ which, in effect, stated that OSHA would ignore the remand on the ground that there was no legal authority for such a remand. The ALJ vacated the remand because the parties had settled the case and submitted the settlement to the ALJ for approval. The ALJ stated that he was vacating the remand because of the settlement and not for the reason stated in the Solicitor's letter, which had cited no authority. The ALJ noted that there was precedent for remands to OSHA and that the ARB routinely remands cases to ALJs even though there is no express authority for such a procedure. As an aside, the ALJ

noted that it would have been more proper for the Solicitor to have filed a motion for reconsideration rather than rather than writing the ALJ a letter.

[STAA Digest II G 2]
SETTLEMENTS; AUTOMATIC REVIEW PROCEDURE ENUNCIATED BY ARB APPEARS TO HAVE OVERRULED, SUB SILENTIO, EARLIER AUTHORITY OF THE SECRETARY OF LABOR

In ***Fraley v. Transervice Logistics, Inc.***, 2005-STA-11 (ALJ June 28, 2005), the ALJ issued a Decision and Order Recommending Approval of Settlement Agreement. The ALJ observed that the ARB had ruled that such ALJ orders are subject to the automatic review provisions of the STAA and the STAA regulations, but that such rulings seemed to have overruled, *sub silentio*, the Secretary of Labor's holdings in *Shown v. Wilson Truck Corp*., 1992-STA-6 (Sec'y Apr. 20, 1992) and *Creech v. Salem Carriers, Inc.*, 1988-STA-29 (Sec'y Sept. 27, 1988).

[STAA Digest II H 4]
ARB BRIEFING REQUIREMENTS; DISCRETION TO CONSIDER UNTIMELY BRIEF; COMPLAINANT "OVER THE ROAD" WHEN ALJ DECISION SERVED

In ***Forrest v. Dallas and Mavis Specialized Carrier Co.***, ARB No. 04-052, ALJ No. 2003-STA-53 (ARB July 29, 2005), the ARB exercised its discretion to consider the pro se Complainant's untimely brief where he did not receive the ALJ's recommended decision in a timely manner because the Complainant was working "over the road" at the time the ALJ's decision was served.

[STAA Whistleblower Digest II H 4]
PRO SE LITIGANT; ASSISTANCE FROM THE TRIBUNAL IS NECESSARILY LIMITED

In explaining how it would afford liberal construction in the review an appeal of a pro se complainant in a STAA whistleblower complaint, the ARB nevertheless stated in a footnote:

> We recognize that while adjudicators must accord a pro se complainant "fair and equal treatment, [such a complainant] cannot generally be permitted to shift the burden of litigating his case to the [adjudicator], nor to avoid the risks of failure that attend his decision to forgo expert assistance." *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 10 n.7 (ARB Feb. 29, 2000), *quoting Dozier v. Ford Motor Co.*, 707 F.2d 1189, 1194 (D.C. Cir. 1983). Affording a pro se complainant undue assistance in developing a record would compromise the role of the adjudicator in the adversary system. *See Young*, slip op. at 9, *citing Jessica Case, Note: Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law an Excuse?*, 90 KY. L. J. 701 (2002).

Cummings v. USA Truck, Inc., ARB No. 04-043, ALJ No. 2003-STA-47 (ARB Apr. 26, 2005).

[STAA Digest II H 4 c]
MOTION FOR RECONSIDERATION OF ARB DECISION; STANDARDS

The standards the ARB applies in consideration of a motion for reconsideration or for relief from judgment are stated in ***Cummings v. USA Truck, Inc.***, ARB No. 04-043, ALJ No. 2003-STA-47 (ARB June 30, 2005). The ARB analogized such motions to petitioning for panel rehearing under Rule 50 the FRAP, requesting reconsideration of a final judgment or appealable interlocutory order under FRCP 59 or 60(b), and a motion for relief from a judgment under FRCP 60(b). The Board noted that it looks to 29 C.F.R. § 18.34(c) in considering whether to consider new evidence. In the instant case, the Complainant submitted new evidence on reconsideration, but the Board found that it did not alter the record or the ALJ's determination in regard to whether the Complainant engaged in protected activity under the STAA, and merely raised the same arguments that were considered and rejected by the Board in its prior decision. Thus, the Board declined to reconsider.

[STAA Digest II M]
DISCOVERY; REFUSAL TO COMPLY WITH PROTECTIVE ORDER; CERTIFICATION TO FEDERAL DISTRICT COURT; SANCTION IMPOSING ATTORNEY FEES

In ***Coates v. Southeast Milk Institute, Inc.***, 2004-STA-60 (ALJ Feb. 10, 2005), the Respondent inadvertently produced a privileged document, which the Complainant disseminated to the Respondent's clients and customers. The Respondent filed a motion for a protective order. The ALJ granted the motion, instructing the Complainant to return the document and refrain from relying on or using the document during the proceedings. The ALJ reconsidered this ruling upon motion by the Complainant, but reaffirmed his previous ruling. The ALJ later granted summary judgment to the Respondent. Subsequently, the Respondent filed a motion for sanctions against the Complainant because he failed to comply with the ALJ's protective order, and to certify the facts to a U.S. Court as permitted under 29 C.F.R. § 18.29(b). The Respondent later supplemented this motion to include the activities of the Complainant's agent.

In ruling on the motion, the ALJ observed that he had received copies of documents confirming that the Complainant continues to violate the protective order. The ALJ found that it was clear that the Complainant had no intention of complying with the protective order. The ALJ, therefore granted the Respondent's motion and certified the facts to the U.S. District Court for the Middle District of Florida, requesting that the court take appropriate actions as if the violations had occurred before that court.

The matter was referred to a U.S. Magistrate Judge who conducted a hearing and issued a Report and Recommendation. ***Southeast Milk, Inc. v. Coates***, No. 5:05-mc-3-Oc-10GRJ (M.D.Fla. May 31, 2005). The Complainant did not challenge that he had violated the ALJ's protective order and agreed to return all copies of the privileged document to the Respondent. The Magistrate found that attorneys' fees would be imposed against the Complainant as a sanction for repeatedly disobeying

the ALJ's orders, thereby causing the Respondent to move for sanction before the ALJ, and then petition the district court for enforcement. The fees imposed related to seeking the sanction before the ALJ and the proceedings before the district court.

The District Court thereafter adopted and confirmed the Magistrate's Report and Recommendation. ***Southeast Milk, Inc. v. Coates***, No. 5:05-mc-3-Oc-10GRJ (M.D.Fla. July 5, 2005).

[STAA Digest II M]
COSTS IMPOSED AGAINST COMPLAINANT; ALJ DOES NOT HAVE THE AUTHORITY TO AWARD

In ***Sabin v. Yellow Freight System, Inc.***, ARB No. 04-032, ALJ No. 2003-STA-5 (ARB July 29, 2005), the ARB found that that the ALJ did not have the authority to award to the Respondent $150 for the attendance of its witness on the scheduled hearing date where the Complainant withdrew his objections to the OSHA findings at the hearing. The ARB distinguished *Hester v. Blue Bell Servs.*, 1986-STA-11 (Sec'y July 9, 1986), because this was not a case in which the Complainant was allowed to take a voluntary dismissal conditioned on payment of the opposing parties' costs.

[STAA Whistleblower Digest II M]
ATTORNEY MISCONDUCT

See ***Edward A. Slavin, Jr.***, ARB No. 04-088, ALJ No. 2004-MIS-2 (ARB Apr. 29, 2005), in the Miscellaneous Whistleblower Case Digest for casenotes relating to the standards applicable to a 29 C.F.R. § 18.34(g)(3) suspension proceeding.

[STAA Digest II V]
MOTION FOR STAY; ALJ HAS DISCRETION TO DENY MOTION PRESENTED ON EVE OF HEARING

In ***Sabin v. Yellow Freight System, Inc.***, ARB No. 04-032, ALJ No. 2003-STA-5 (ARB July 29, 2005), the ALJ did not abuse his discretion in denying the Complainant's motion for a stay presented on the eve of the hearing because he wanted to continue the STAA action until the resolution of a state court action he intended to file (the Complainant not wanting to pay attorney's fees for two actions). The Complainant had ample notice of the hearing date and gave no reason for waiting until the eve of the hearing to present his motion.

[STAA Digest IV A 2 a]
CAUSATION; ABANDONMENT OF JOB; UNNECESSARY FOR ALJ TO MAKE RULING ON NON-DISPOSITIVE ISSUES

Where the Complainant could have worked in the Respondent's warehouse until the truck he complained about was repaired and then driven it, or could have taken a different truck, but instead just left and never asked to return to work, the ARB agreed with the ALJ that the complaint was deficient as a matter of law. The Complainant offered no reason for walking off the job rather than waiting for the repairs to be made or driving a different truck. The ARB's decision implies that it was proper for the ALJ not to determine whether the defects the Complainant

identified constituted violations of safety laws or supported a reasonable apprehension of serious injury, because the case could be resolved solely on the Complainant's failure to establish that the Respondent retaliated against him for refusing to drive the truck. ***Prior v. Hughes Transport, Inc.***, ARB No. 04-044, ALJ No. 2004-STA-1 (ARB Apr. 29, 2005).

[STAA Digest IV B 2 e]
LEGITIMATE NON-DISCRIMINATORY REASON FOR DISCHARGE; FAILURE TO ADEQUATELY CLEAN CONCRETE FROM TRUCK

In ***Mason v. CB Concrete Co.***, ARB No. 04-026, ALJ No. 2003-STA-21 (ARB Jan. 31, 2005), the ARB affirmed the ALJ's conclusion that the Respondent had discharged the Complainant for a legitimate reason — allowing the build-up of excess concrete on his truck in violation of the Respondent's rules. The Complainant argued that this reason was pretext because CB issued only warnings to other drivers who had concrete build-up and committed other, more serious infractions. The ARB, however, found that the fact that another driver was given only a warning for concrete build-up instead of being discharged was is insufficient to establish that the Complainant was fired because of protected activity, where the warning to the other driver followed the Complainant's discharge by more than three months, the warning letter threatening the other employee was more harsh than the initial verbal warning given to the Complainant (thus, the Complainant was not initially treated more harshly than the other driver), and the concrete build-up on the other truck was far less significant than the heavy accumulation on the Complainant's truck.

[STAA Digest V A]
PROTECTED ACTIVITY; REFUSAL TO SUBMIT TO A RANDOM DRUG TEST

Refusal to take a random drug test is not protected activity under the whistleblower provision of the STAA. Because it was undisputed that the Complainant was fired for this reason, the ALJ properly dismissed the complaint as a matter of law. ***Bergman v. Schneider National***, ARB No. 03-155, 2004-STA-19 (ARB Apr. 29, 2005).

[STAA Digest V A 4 c iii]
PROTECTED ACTIVITY; CALL ASKING ABOUT POLICY IS NOT A COMPLAINT ABOUT THE POLICY

In ***Toland v. Keystone Freight Corp.***, ARB No. 03-151, ALJ No. 2003-STA-25 (ARB Jan. 28, 2005), the ARB affirmed the ALJ's finding that the Complainant failed to prove that he engaged in protected activity when he called the Respondent's dispatcher and asked about the company's policy concerning over hours driving. The ALJ found that this call was not protected because it was merely a "query," not a concern or complaint about violating the DOT driving hours regulations.

[STAA Digest V B 2 b]
PROTECTED ACTIVITY; COMPLAINT ABOUT UNCOMFORTABLE SEAT

In ***Jackson v. Wyatt Transfer, Inc.***, ARB No. 04-012, ALJ No. 2000-STA-57 (ARB Dec. 30, 2004), the ARB rejected the Complainant's contention that he engaged in protected activity when he complained that his assigned truck did not have a seat

that oscillated, and therefore caused discomfort in his back. The Board noted that the Complainant had sought to link an uncomfortable seat with safety, but held that the Complainant's apprehension that an uncomfortable seat is an unsafe condition did not appear to have been reasonable.

[STAA Digest V B 2 c]
PROTECTED ACTIVITY; REFUSAL TO DRIVE IN AREA WHERE THERE HAD BEEN RANDOM SNIPER SHOOTINGS

In ***Cummings v. USA Truck, Inc.***, ARB No. 04-043, ALJ No. 2003-STA-47 (ARB Apr. 26, 2005), the Complainant was scheduled to drive a load of cargo from Ohio to Virginia via the Washington, D.C., area. Because random sniper shootings were occurring in the Washington, D.C. area at that time, Cummings states that he refused to drive the cargo to Virginia as he feared for his safety. The Respondent fired him the same day.

The Complainant argued that to drive under such circumstances would constitute a violation of the prohibitions against carriers requiring or permitting the operation of a motor vehicle in hazardous conditions pursuant to 49 C.F.R. § 392.14 or the operation of a motor vehicle in an unsafe condition pursuant to 49 C.F.R. § 396.7. The ARB rejected this argument, finding that to invoke protection under 49 U.S.C.A. § 31105(1)(B)(i), a complainant must allege and ultimately prove that an actual violation would have occurred. The Board stated that contrary to the Complainant's assertion, a reasonable and good faith belief by the driver alone that it is unsafe to drive is not enough. Moreover, the ARB stated that the hazardous conditions described at Section 392.14 are only those conditions affecting visibility or traction which would make it unsafe to operate a commercial motor vehicle.

[STAA Digest VII B 1]
IDENTIFICATION AND LOCATION OF PROPER RESPONDENT

In ***Sexton v. Kroll's Trucking***, ARB No. 04-030, ALJ No. 2003-STA-18 (ARB Apr. 29, 2005), there had been some confusion about what entity had employed the Complainant, and OSHA had conflated two entities, one of which had only rented space to the Complainant's employer. The only address on record was for the company that rented the space. The ALJ dismissed that entity and dismissed the case. On review, the ARB affirmed the ALJ's decision to dismiss the wrongly named entity, but because the record did not indicate that the other entity was ever informed of the complaint, OSHA's investigation into the complaint, or the proceedings before the ALJ, the ARB remanded the case to the ALJ for further proceedings.

On remand, the ALJ noted that the case could not proceed to hearing because there was no address for the remaining Respondent. The ALJ recounted that the evidence of record established that the Complainant's Employer was a short lived enterprise of only three months, and that its owner's whereabouts were unknown. Because OALJ does not have investigators, the ALJ was compelled to remand the case to OSHA to endeavor to locate the Respondent. ***Sexton v. Kroll's Trucking***, ALJ No. 2003-STA-18 (ALJ May 19, 2005).

[STAA Digest VII B 3]
EMPLOYER-EMPLOYEE RELATIONSHIP; LACK OF INVOLVEMENT IN HIRING OR FIRING DECISIONS

A respondent carrier that operated through independent contractor drivers, paid its independent contractors a percentage of gross receipts, screened drivers to make sure they qualified under its liability insurance and DOT regulations, but did not engage in the hiring or firing decisions of its independent contractors, who were responsible for withholding state and federal taxes and providing workers' compensation and unemployment insurance for their own employees, was not the Complainant's employer within the meaning of the STAA. ***Forrest v. Dallas and Mavis Specialized Carrier Co.***, ARB No. 04-052, ALJ No. 2003-STA-53 (ARB July 29, 2005).

[STAA Digest IX A 6]
REINSTATEMENT; REMEDY OF REINSTATEMENT IS MANDATORY UNLESS THE PARTIES DEMONSTRATE THAT CIRCUMSTANCES EXIST MAKING THAT REMEDY INAPPROPRIATE; FACT THAT COMPLAINANT DOES NOT SEEK REINSTATEMENT IS NOT DETERMINATIVE

In ***Dale v. Step 1 Stairworks, Inc.***, ARB No. 04-003, 2002-STA-30 (ARB Mar. 31, 2005), the ARB found that the ALJ erred as a matter of law in failing to order reinstatement, apparently having accepted at face value the Complainant's attorney's statement at hearing that the Complainant was not seeking reinstatement. The Board described the various policies supporting the remedy of reinstatement which make it clear that the preferences of the parties are not determinative and that reinstatement is mandatory except in circumstances such as where the parties have demonstrated the impossibility of a productive and amicable working relationship, or where the company no longer has positions for which the complainant is qualified. The Board indicated that another reason that reinstatement is presumptive is to prevent a back pay windfall for a complainant whose entitlement to back pay would otherwise be cut off following a bona fide offer of reinstatement.

On remand, the ALJ issued a order mandating reinstatement and reopening the record to afford the parties an opportunity to address the issues raised by the remand. ***Dale v. Step 1 Stairworks, Inc.***, 2002-STA-30 (ALJ Aug. 11, 2005). After some confusion on the part of the Employer, it made an offer of reinstatement, which the Complainant declined. In a footnote, the ALJ observed:

> Appellate precedent is conflicting with respect to whether a trier of fact may rely upon a complainant's representation that reinstatement is not sought. For example, in Dutile v. Tighe Trucking, Inc., 93 STA 31 (Sec'y 1994), cited by the Board in this matter, a ***pro se*** complainant's statement that he did not seek reinstatement was deemed unacceptable. In contrast, Complainant here is not *pro se*. Moreover, it has been held that while the STA expressly provides that a prevailing complainant is entitled to reinstatement, 49 U.S.C. § 2305(c)(2)(B), the statute does not prohibit voluntary waiver of that right. Thus, the Secretary has held that a complainant's decision not

> to seek reinstatement must be recognized and respected, *See, e.g.*, Moravec v. HC & M Transportation, Inc., 90-STA-44 (Sec'y Jan. 6, 1992), slip op. at 22 n14, appeal docketed, No. 92-70102 (9th Cir. Feb. 18, 1992); Nidy v. Benton Enterprises, 90-STA-11 (Sec'y Nov. 19, 1991), slip op. at 17 n.15, and while there may be cases in which reinstatement should be ordered despite, for example, a *pro se* complainant's remarks to the contrary, the Secretary has held that a deliberate decision not to seek reinstatement must be respected. Thus, in Nix v. Nehi-RC Bottling Company, Inc., 84-STA-1 (Sec'y July 13, 1984), the Secretary found that respondent had violated the employee protection provision of the STA; however, the complainant was not interested in returning to work for Respondent and reinstatement was not ordered. Nevertheless, the law of the case here is set forth in the Board's March 31, 2005 decision, and a reinstatement order was entered despite Complainant's waiver of reinstatement at the hearing.

On remand, the Respondent argued, essentially, that it would be inequitable to make it liable for back pay from the date that the Complainant waived reinstatement until the date that it was ordered on remand to reinstate the Complainant notwithstanding the waiver. The ALJ found, however, that the ARB was aware that back pay liability would be substantially increased when it rendered its remand order.

[STAA Digest IX A 9]
FRONT PAY IN LIEU OF REINSTATEMENT

In ***Ass't Sec'y & Bryant v Mendenhall Acquistion Corp.***. ARB No. 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005), the ARB found that front pay in lieu of reinstatement was appropriate where the Complainant had worked for the Respondent as an owner-operator, but no longer owned a truck at the time of the Respondent's offer of reinstatement. The Complainant had also turned down the offer of reinstatement because he believed he could make more money with his current employer. The ARB found that the Complainant's entitlement to front pay began when the Complainant turned in his truck because he could not make the payments on it.

The ARB remanded the case for the ALJ to make relevant findings and to repen the record to take evidence about the Complainant's employment subsequent to the hearing. The Board wrote:

> We note that a litigant who seeks an award of front pay must provide the district court "with the essential data necessary to calculate a reasonably certain front pay award." *McKnight v. General Motors Corp.*, 973 F.2d 1366, 1372 (7th Cir. 1992). Such information includes the amount of the proposed award, the length of time the complainant expects to work, and the applicable discount rate. *Id.* Moreover, front pay awards, while often speculative, cannot be unduly so. The longer a proposed front pay period, the more speculative the damages become. *Hybert v. Hearst Corp.,* 900 F.2d 1050, 1056 (7th Cir. 1990). Therefore, on remand, we expect the parties to submit

> relevant evidence demonstrating both the amount and the duration of a front pay award. If on remand, the ALJ considers the issue of future earnings, we refer him to *Doyle*, slip op. at 7-8, for guidance on computing the present value of future earnings.

Slip op. at 9.

[STAA Digest IX B 2 a]
BACK PAY AWARDS; LEGAL FRAMEWORK

In ***Ass't Sec'y & Bryant v Mendenhall Acquistion Corp.***. ARB No. 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005), the ARB summarized the legal background to back pay awards in STAA whistleblower cases:

> A wrongfully terminated employee is entitled to back pay. 49 U.S.C.A. § 31105(b)(3). "An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA." *Assistant Sec'y & Moravec v. HC & M Transp., Inc*., 90-STA-44, slip op. at 10 (Sec'y Jan. 6, 1992). The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. ...
>
> Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e et seq. (West 1988). ... Ordinarily, back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement. ... While there is no fixed method for computing a back pay award, calculations of the amount due must be reasonable and supported by evidence; they need not be rendered with "unrealistic exactitude." ...

Slip op. at 5-6 (some citations omitted).

[STAA Digest IX B 2 b iii]
BACK PAY; ALJ IS REQUIRED TO MAKE A FINDING ON THE DATE THAT BACK PAY LIABILITY ENDS

In ***Dale v. Step 1 Stairworks, Inc.***, ARB No. 04-003, 2002-STA-30 (ARB Mar. 31, 2005), the ALJ erred by failing to determine when the Respondent's back pay liability ended. Back pay liability ends when the employer makes a bona fide unconditional offer of reinstatement or when the complainant declines such an offer.

[STAA Digest IX B 2 b viii]
PRE- AND POST-JUDGMENT INTEREST; ALJ MUST CALCULATE; INTEREST COMPOUNDS QUARTERLY

In ***Dale v. Step 1 Stairworks, Inc.***, ARB No. 04-003, 2002-STA-30 (ARB Mar. 31, 2005), the ARB found that the ALJ had committed several errors in calculating the

back wages owed the Complainant, and remanded for further proceedings. Part of the Board's instructions relating to remand involved the calculation of interest. The Board wrote:

> Furthermore, the ALJ should determine the pre-judgment and post-judgment interest on the back pay award. *See Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 99-STA-34, slip op. at 9 (ARB Dec. 29, 2000). In calculating the interest on back pay awards under the STAA, the rate used is that charged for underpayment of federal taxes. *See* 26 U.S.C.A. § 6621(a)(2) (West 2002); *Drew v. Alpine, Inc.,* ARB Nos. 02-044, 02-079, ALJ No. 2001-STA-47, slip op. at 4 (ARB June 30, 2003). Moreover, the interest accrues, compounded quarterly, until Step 1 pays the damages award. *Assistant Sec'y & Cotes v. Double R. Trucking, Inc.*, ARB No. 99-061, ALJ No. 1998-STA-34, slip op. at 3 (ARB Jan. 12, 2000); *see Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 89-ERA-22, slip op. at 18-21 (ARB May 17, 2000) (outlining the procedures to be followed in computing the interest due on back pay awards).

To the same effect ***Ass't Sec'y & Bryant v Mendenhall Acquistion Corp.***. ARB No. 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005).

[STAA Digest IX B 2 b xvii]
BACK PAY AWARD; METHOD FOR CALCUATION; NO ADJUSTMENT FOR OWNER-OPERATOR STATUS

In ***Ass't Sec'y & Bryant v Mendenhall Acquistion Corp.***. ARB No. 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005), the ARB found that the ALJ erred in calculating back pay for a driver who had worked for the Respondent as an owner-operator, but whose subsequent employment was as an employee driver. The ALJ had attempted to make adjustments for the different ways that contract drivers and employee drivers are paid. The ARB, however, found that this was error, holding that the Complainant's "earnings before mandatory payroll deductions, whether as an independent contractor or an employee, are the basis for the back pay (and front pay) award."

The ARB calculated the back pay award by determining the average weekly amount that the Respondent paid to the Complainant (using calendar weeks, rounded to the closest full week). It then calculated the length of the back pay liability from the date the Complainant was terminated until the date that the Complainant's truck had been repossessed (and he therefore could not have worked as an owner-operator) rather than the actual date that the Employer offered reinstatement. The Board then multiplied the number of weeks of the back pay liability by the average weekly income from the Respondent. Finally, the Board deducted the Complainant's interim earnings with his subsequent employer.

[STAA Digest IX B 3 a]
MITIGATION OF DAMAGES; BURDEN OF PROOF IS ON THE RESPONDENT; ALJ HAS A DUTY TO INFORM A PRO SE LITIGANT OF THAT BURDEN

In ***Dale v. Step 1 Stairworks, Inc.***, ARB No. 04-003, 2002-STA-30 (ARB Mar. 31, 2005), the ARB found that the ALJ erred in limiting a back pay award based on a finding that the Complainant had failed demonstrate an effort to mitigate losses. A complainant has a duty to exercise reasonable diligence to mitigate damages, but it is the employer's burden to prove failure to mitigate.

In ***Dale***, the Respondent was appearing pro se. Consequently, the Board found that the ALJ had a duty to inform the Respondent that it had the burden of proof to show that the Complainant had breached his duty to mitigate damages.

[STAA Digest IX C]
ATTORNEY'S FEES; HOURLY RATE; NO REDUCTION BASED ON FACT THAT THE HEARING OCCURRED BEFORE AN ADMINISTRATIVE AGENCY RATHER THAN A FEDERAL COURT

In ***Dalton v. Copart, Inc.***, ARB Nos. 04-027 and 04-138, ALJ No. 1999-STA-46 (ARB June 30, 2005), the Respondent had opposed the hourly rate requested by the Complainant's attorney based on the argument that the attorney was inexperienced and that a lower rate should be charged in an administrative proceeding as compared to federal court. The ARB affirmed the ALJ's findings that the attorney was sufficiently experienced to command the requested rate and that there was no valid legal precedent for reducing the rate because the hearing was before an ALJ.

[STAA Digest IX C]
ATTORNEY'S FEES; ENHANCEMENT FOR DELAY

In ***Dalton v. Copart, Inc.***, ARB Nos. 04-027 and 04-138, ALJ No. 1999-STA-46 (ARB June 30, 2005), the ARB granted the Complainant's motion to enlarge the fee award to compensate for a five year delay in receiving the fees (the delay being partly attributable to the ARB's reversal of the ALJ's liability finding, which in turn had been reversed by a federal court of appeals). In regard to calculation of the enlargement, the Board wrote:

> The ARB's method for determining the amount of the enlargement is set out in *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 89-ERA-22, slip op. at 15-16 (ARB May 17, 2000), *overturned on other grounds*, *Doyle v. United States Sec'y of Labor*, 285 F.3d 243 (3d Cir. 2002). An addition to an attorney fee award should be the **lesser** of the additions calculated as follows:
>
> > (1) the number of hours multiplied by the current rates of the attorneys, or
> > (2) the award multiplied by the percentage change in Consumer Price Index – All Urban Consumers, U.S. city average (CPI-U).

Id. at 15-16.

The Board then calculated under both methods and concluded that the CPI method produced the lesser amount in this case.

[STAA Digest X A]
SETTLEMENTS BEFORE THE ALJ IN STAA CASES; BOARD REVIEW PROCEDURE

In ***Ass't Sec'y & Hisert v. Longhorn Trucking Co., Inc.***, ARB No. 05-056, ALJ No. 2004-STA-49 (ARB Apr. 28, 2005), the parties settled before the ALJ. The ALJ approved the settlement and forwarded it to the ARB for entry of a final order. The ARB reviewed the settlement, found it to be fair, adequate and reasonable, and dismissed the complaint. No mention is made of whether a briefing schedule was issued.

Under similar circumstances in ***Samsel v. Roadway Express, Inc.***, ARB No. 05-033, ALJ No. 2002-STA-46 (ARB Apr. 29, 2005), the ARB issued a briefing schedule, to which no party responded. The Board thereupon reviewed the agreement and approved it with a few clarifications. *To the same effect* ***Gomaz v. Roadway Express, Inc.***, ARB No. 05-021, ALJ No. 2004-STA-15 (ARB Apr. 29, 2005).

[STAA Digest X A 3]
[STAA Digest XI A 4]
SETTLEMENT; PARTIES' STIPULATED DISMISSAL ASSUMED NOT TO INCLUDE A SETTLEMENT

In ***Green v. Deffenbaugh Disposal Services***, ARB No. 05-034, ALJ No. 2004-STA-50 (ARB Feb. 28, 2005), the ARB assumed that no settlement underlied a joint stipulation of dismissal with prejudice which did not refer to a settlement, even though the Complainant had indicated a desire to settle in a telephone conference call the prior week, "since [a settlement] would have to be submitted to the ALJ for approval and then approved by the Administrative Review Board. *See* 29 C.F.R. § 1978.111(d)(2)."

[STAA Digest XI A 1]
WITHDRAWAL; ALJ SHOULD HAVE REQUIRED WRITTEN WITHDRAWAL EVEN THOUGH COMPLAINANT MADE UNEQUIVOCAL WITHDRAWAL DURING TELEPHONE CONFERENCE CALL; HARMLESS ERROR, HOWEVER, SINCE COMPLAINANT DID NOT OBJECT ON AUTOMATIC REVIEW BY THE ARB

In ***Hardy v. Environmental Restoration, LLC***, ARB No. 05-019, ALJ No. 2004-STA-20 (ARB Jan. 11, 2005), the Complainant made an unequivocal withdrawal of his complaint during a telephone conference with the ALJ. The ALJ treated the unequivocal withdrawal as the equivalent of a written statement of intent to withdraw objections to the OSHA findings. Upon automatic review, the Board issued a briefing schedule. The Respondent informed the Board that it agreed with the ALJ's recommended decision and would not be filing a brief. The Complainant did not respond.

The Board held that "pursuant to the plain language of 29 C.F.R. § 1978.111(c), the ALJ should have required [the Complainant] to submit a written withdrawal. But given [the Complainant's] failure to object to this deviation from the regulation in a brief to this Board, we find the ALJ's departure from the regulation to be harmless error." Slip op. at 3 (footnote omitted). The Board therefore approved the recommended order and dismissed the complaint.

This case also stands for the proposition that the ARB must issue the final order, even when a complaint is withdrawn (overrules prior authority). *See also* ***Elliot v. Chris Truck Line***, ARB No. 04-132, ALJ No. 2002-STA-43 (ARB Jan. 28, 2005) (Complainant withdrew; more than 1 1/2 years elapsed before case was transferred to ARB for automatic review and issuance of final order).

[STAA Digest XI A 1]
WITHDRAWAL OF OBJECTIONS TO FINDINGS; EFFECT IS DISMISSAL "WITH PREJUDICE"

When OSHA has found against a complainant and the complainant withdraws his objections to the findings, the result is a final order upholding the OSHA findings. The ALJ's dismissal of the matter under such circumstances is "with prejudice" insofar as a complainant could not thereafter refile a complaint in the DOL alleging the same facts. ***Sabin v. Yellow Freight System, Inc.***, ARB No. 04-032, ALJ No. 2003-STA-5 (ARB July 29, 2005).

[STAA Digest XI B 1]
DISMISSAL FOR CAUSE; FAILURE TO PROSECUTE

In ***Ferguson v. Bomac Lubricant Technologies, Inc.***, ARB No. 04-057, ALJ No. 2002-STA-27 (ARB June 29, 2005), the ALJ had continued the hearing in light of the Respondent's bankruptcy. The ALJ later issued an order directing a status report; the Respondent reported that the Bankruptcy Court had ordered sale of all its operating assets and that it had been informed that the proceeds all went to secured creditors and administrative expenses in the bankruptcy cases, with nothing left for distribution to unsecured creditors, including the Complainant. Later, the Complainant's counsel informed the ALJ that he had been unable to contact the Complainant. The ALJ then issued an order to show cause why the complaint should not be dismissed, warning that if the Complainant failed to respond, he would entertain a motion to dismiss the complaint. The Complainant did not reply and the ALJ issued a recommended order of dismissal. Upon automatic review, the ARB issued a Notice of Review and Briefing Schedule, of which the Complainant acknowledged receipt by signing a certified mail Domestic Return Receipt. The Complainant did not respond to the ARB's Notice.

Consequently, the ARB affirmed the ALJ's dismissal for want of prosecution.

[STAA Digest XII]
COLLATERAL ESTOPPEL; STATE CIVIL SUIT PRESENTING IDENTICAL ISSUE ALLEGED IN STAA COMPLAINT

In ***Germann v. Calmat Co.***, ARB No. 04-008, ALJ No. 2002-STA-28 (ARB May 31, 2005), the ARB affirmed the ALJ's grant of summary judgment to the Respondent on the basis of collateral estoppel where the Complainant had filed a civil suit in the California courts alleging that he had been discharged in violation of state statutes prohibiting an employer from retaliating against an employee who discloses violations of federal or state safety laws to government or law enforcement agencies, the civil suit was tried before a jury which found against the Complainant, and the California Court of Appeals affirmed the jury verdict. The ARB applied California law regarding when to give preclusive effect to a decision by another California court, and found that all elements were present in the instant case (identical issue; final judgment on the merits; same party). The Board also found that the STAA regulations at 29 C.F.R. § 1978.112(c) mandated deferral to the state court determination.